IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1228

CECIL K. NICKELL - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202

BERNARD J. GILDAY, JR.
1500 American Building
30 East Central Parkway
Cincinnati, Ohio 45202

Counsel for Petitioner

March 1, 1978

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

CECIL K. NICKELL - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, CECIL K. NICKELL, respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on March 28, 1977.

OPINIONS BELOW

The Opinion of the Court of Appeals and the Dissenting Opinion of Judge Wade McCree entered on March 28, 1977 (Appendix A) is reported at 552 F. 2d 684. A Petition for Rehearing was filed and the United States was ordered to respond. The Order of the Court of Appeals overruling Petitioner's Petition for Rehearing was entered on February 3, 1978 (Appendix B).

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit (Appendix A) was entered on March 28, 1977; and a timely Petition for Rehearing was denied by Order of the Court of Appeals for the Sixth Circuit (Appendix B) on February 3, 1978. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the District Court committed prejudicial error in denying the Petitioner's entitlement to discover Jencks Act statements when it failed to follow clear statutory procedures, in violation of 18 U.S.C. §3500.
2. Whether the Petitioner was denied a fair trial where the prosecution repeatedly made improper and prejudicial comments throughout the trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

Title 18 U.S.C. §3500 provides in pertinent part as follows:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States

> to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

STATEMENT OF THE CASE

This is a prosecution under 18 U.S.C. §§2113(a), 2nd paragraph, and §2(a). This case was tried before a jury in the United States District Court for the Southern District of Ohio, Western Division, on May 17, 18, 19 and 20, 1976.

The Indictment charged that the Petitioner aided and abetted the commission of a bank burglary of the Springdale, Ohio branch of the First National Bank of Cincinnati on or about September 15, 1974.

After all evidence had been heard, the case went to the jury. The jury deliberated, over two days, for a period of over five hours. In this close case, the Petitioner was found guilty as charged and sentenced to serve 15 years in prison. Petitioner appealed the conviction to the Court of Appeals for the Sixth Circuit. On appeal, Petitioner argued, among other issues, that the District Court committed prejudicial error in denying the Petitioner's right to discover Jencks Act statements when it failed to follow the clear statutory procedures of 18 U.S.C. §3500, and that the Petitioner was denied a fair trial where the prosecution repeatedly made improper and prejudicial comments throughout the trial.

The conviction was affirmed by a two to one Opinion of the Court of Appeals with Judge Wade McCree filing a Dissenting Opinion (Appendix A). A timely Petition for Rehearing was filed and the United States was ordered to respond. The Petition, almost eleven (11)

months later, was denied (Appendix B). Petitioner filed a Motion for Stay of Mandate Pending Certiorari which was granted on February 15, 1978.

REASONS FOR GRANTING THE WRIT

1. This Court Now Has the Opportunity to Alleviate the Confusion So Surrounding the Material and Information to Which a Criminal Defendant Is Entitled Under the Jencks Act, 18 U.S.C. §3500.

At trial and following the defense case, the prosecution called four rebuttal witnesses, one of which was F.B.I. Special Agent Charles G. Williams. Special Agent Williams had not testified previously in the prosecution's case-in-chief.

Special Agent Williams participated in the investigation of the bank burglary at issue. After the direct examination of this witness, the defense moved to examine any Jencks Act material to which it would be entitled.

> Mr. Gilday: Your Honor, prior to the cross-examination of Special Agent Williams we move for all Jencks Act material to which we would be entitled before cross-examining Mr. Williams. [T.E., Vol. II, p. 412.]

Co-counsel for the Petitioner amplified this defense motion for Jencks Act materials.

> Mr. Haddad: We would respectfully submit to your Honor that we have to take the government's representation at this stage, but we would submit to your Honor that *it is pretty common knowledge*

that a case agent will have made any number of reports, whether they be 302 reports of other witnesses or whether they be his own investigative reports. And if you are saying that there isn't any of that kind of stuff, we have already seen some of it.

Mr. Winkler: I am not saying that. I am not saying there is no investigative report. I am sure he made investigative reports that was comprised of interviews with other witnesses. I am saying there are no statements from this witness.

The Court: Yes. Well, I suppose if you dictate something into the file and say on such and such a day I talked with witness so and so who said so and so, if it weren't for the fact that he was a government employee that would be a Jencks thing in and of itself, wouldn't it? That's your point as I see it.

Mr. Haddad: Yes, sir. [Emphasis added.] [T.E., Vol. III, 421.]

Furthermore defense counsel carefully preserved the record in regard to examination of the Jencks Act materials for the witness Williams. The entire colloquy is here reproduced.

> Mr. Haddad: I would like to pin down, if you would, your Honor, for the record, a ruling here as far as the Jencks Act material is concerned on Special Agent Williams. As I understand it, the government is contending that they have no such statement from him other than 302's of interviews he made with various witnesses during this case?
>
> Mr. Winkler: Correct.
>
> Mr. Nyktas: Which have all been supplied to you. Those interviews have been supplied to you after those people testified.

> Mr. Haddad: Of those who testified.
>
> Mr. Winkler: We have also given you all the Brady material.
>
> Mr. Haddad: Are there any 302's on an investigation that this man made, interviews of other witnesses that did not testify?
>
> Mr. Nyktas: I am sure there are.
>
> Mr. Winkler: I am sure there are.
>
> Mr. Haddad: You are contending that that's not Jencks Act material?
>
> Mr. Winkler: Sure.
>
> Mr. Haddad: Under the theory that they are investigative reports?
>
> Mr. Winkler: Right.
>
> Mr. Haddad: Now, there is no case agent report as such from Williams delineating his conclusions and his—
>
> Mr. Winkler: The FBI doesn't make conclusions. All they do is complete it. They send it to us and we decide what to do with it.
>
> Mr. Haddad: Well, I don't know. We think that anything that this witness may have submitted committed to writing would be discoverable once he is called to the stand.
>
> Mr. Nyktas: Well, the subject matter of what he testified to was provided to you under Jencks material, even Green and a few witnesses before, that is his memorandum of interviews on the 16th with Green and on the 18th. That was all given to you, even before he got on the stand.
>
> Mr. Haddad: As I understand it, Jencks Act material is not necessarily limited to the scope of the witness' direct examination.
>
> The Court: I think that is true. It covers any statement he has given, the witness himself, doesn't it?

Mr. Winkler: Correct. I am saying he hasn't given any statements. His investigative report is a compilation of statements of a number of other witnesses. [T.E., Vol. III, 425.]

At this point, defense counsel specifically requested the Court to examine the Government's documents to ascertain whether they were Jencks Act statements.

Mr. Haddad: Well, we expect probably the best way to preserve this record would be to ask your Honor to ask the government to produce all those things and seal them, after you have looked at them of course—In other words, I don't see how we can determine whether these things are Jencks Act material which they claim are not unless your Honor takes a look at them.

The Court: You are simply talking about Williams now?

Mr. Hadded: Yes, sir.

The Court: As far as Williams is concerned, the Court will decline that. [T.E., Vol. III, pp. 425-426.]

Thus, the Court declined to inspect the questioned documents in camera.

The Court stated that it would accept the Government's representation that there were no Jencks Act statements for Special Agent Williams.

Mr. Hadded: All right. In other words, what I understand you are saying is that, even if it is determined that some of these things the government has but contend are not Jencks Act items, that even if they were Jencks Act items, you are saying that we are not entitled to them at this time?

The Court: *Well, we are accepting the government's representation* that the only thing in there by Williams is a report or various reports of his investigation?

Mr. Winkler: (Nodding.)

The Court: *And we are declining to make them produce them* on the ground that those are not Jencks Act material. [Emphasis added.] [T.E., Vol. III, p. 426.]

Defense counsel felt that the Court should make its own determination as set forth in 18 U.S.C. §3500 and should not rely on the prosecution's representation. With this in mind, defense counsel continued to carefully preserve the record to protect this Petitioner's statutory right to examine Jencks Act statements. Defense counsel moved that the questioned documents be filed under seal and made a part of the record on appeal, to be reviewed if necessary.

Mr. Hadded: All right. I understand your ruling then. My next move or motion then, your Honor, is that they be required to file those under seal in the record in this case so that it can be determined after an examination of these things whether they are or are not Jencks Act material.

The Court: Well, we will decline that, unless you want to do it voluntarily.

Mr. Winkler: No, we don't, your Honor. We don't want to set a precedent on this.

Mr. Hadded: The point is that there would be no way for the Sixth Circuit if it gets to that point to review it unless it's in the record. [T.E., Vol. III, pp. 426-427.]

However, the District Court declined to preserve the record for review regarding the questioned Jencks Act materials.

The Court's action in regard to the questioned "statements" was contrary to the procedure specifically outlined in 18 U.S.C. §3500, the Jencks Act, and established caselaw.

The Jencks Act, subsection (b), provides that, on motion of a defendant, the Court shall order the United States to produce statements of the witness in the possession of the United States which relate to the subject matter as to which the witness has testified. In the present case, on motion of the Petitioner following the direct examination of the witness, the Court *did not* order the United States to produce such statements of the witness.

The Jencks Act, subsection (c), provides that, if the United States claims that any statements it has are not discoverable, then the Court "shall order the United States to deliver such statement for the inspection of the court in camera." In the present case, when the United States claimed that statements of the witness were not discoverable, the Court *did not* order an *in camera* inspection as the Defendant-Petitioner requested and as the Act requires.

The Jencks Act, subsection (c), also provides that where statements are withheld and a defendant objects to such withholding, the entire text of the statement withheld shall be preserved for appeal. In the present case, resulting in the Petitioner's conviction, the Court *did not* take steps necessary to preserve the text of the withheld statements for review on appeal.

Throughout, the Petitioner properly objected to the Court's failure to order production, to inspect *in camera,* and to preserve for review.

The scope of discovery pursuant to the Jencks Act is very broad.

> The Act requires disclosure of all statements for use in impeaching witnesses and "is thus designed to further the fair and just administration of criminal justice." *Goldberg* v. *United States,* —— U. S. ——, 47 L. Ed. 2d 603, 616 (March 30, 1976).

When a moving defendant shows that a Jencks Act statement may exist, then the Court has a statutory duty to conduct an *in camera* hearing to resolve any dispute which may arise.

> If a moving defendant meets the threshold burden of showing that a statutory "statement" may exist, the judge then must conduct a non-adversary inquiry suited to resolve the particular issue presented. [Citations omitted.] *Id.,* at 625.

The Sixth Circuit has interpreted the Act in the same way, finding that the Court has an affirmative duty to conduct a non-adversary *in camera* hearing to resolve Jencks Act disputes.

> A defense motion for production of Jencks material imposes on the trial judge an affirmative duty to conduct a non-adversary hearing, out of the presence of the jury, to ascertain whether documents in the possession of the Government are Jencks Act "statements." *United States* v. *Chitwood,* 457 F. 2d 676, 678 (6th Cir. 1972), cert. den. 409 U. S. 858.

Accord, United States v. *Condor,* 423 F. 2d 904, 911 (6th Cir. 1970), cert. den. 400 U. S. 958; 1 A.L.R.Fed. 252, 257, §3. In the present case, the District Court failed to fulfill its statutory and decisional "affirmative duty" so that the Petitioner was denied his statutory and decisionsal right to inspection of Jencks Act materials.

In the absence of an *in camera* inspection, the Sixth Circuit has indicated that the trial court must at least have the contested "statement" sealed and made a part of the record for a review.

> [T]he District Judge wisely ordered the reports to be made part of the record, sealed for appellate review. *Chitwood, supra,* 457 F. 2d at 678.

Accord, United States v. *Cleveland,* 477 F. 2d 310, 316 (7th Cir. 1973). In the present case, the District Court neither held an *in camera* hearing nor preserved the disputed "statements" in the record for review.

In its Opinion, the Court of Appeals for the Sixth Circuit held that the material heretofore mentioned did not come within the purview of the Jencks Act. However, in the dissenting opinion of Judge McCree, a viewpoint diametrically opposed to that of the majority opinion is detected.

> McCree, Circuit Court (Dissenting). I respectfully dissent. I disagree with that part of the majority opinion that suggests that statements of law enforcement agents who testify at trial are not subject to the provisions of the Jencks Act. The Act permits a defendant to inspect the authenticated or adopted statement of any govern-

> ment witness who has testified. A witness' statement is ordinarily an account of relevant information known to the witness and communicated to government agents during the course of their investigation. However, law enforcement agents themselves also often acquire information about offenses and they are often called to testify about their knowledge. Their information is not always recorded in the same form as is that furnished by other witnesses. The agents instead may include their information in investigative reports that also include much evaluation and discussion of prosecution strategy. Nevertheless, a defendant is entitled under the Jencks Act to any part of an investigative report that is a statement of an agent's knowledge of facts, which if recounted by any other witness and recorded by the agent would be available to the defendant under the Jencks Act. . . . [Appendix A, pp. 35-36.]

In light of the statutory language of 18 U.S.C. §3500 and this Court's holding in *Goldberg* v. *United States, supra,* it is respectfully submitted that Petitioner's unfair conviction below should be reversed.

2. A Decision By This Court Would Clarify What Constitutes a Denial of a Defendant's Entitlement to a Fair Trial in Light of Highly Improper, Prejudicial, and Continuing Prosecutorial Comments.

As previously mentioned, the Petitioner was charged with bank burglary. The United States alleges that the Petitioner had somehow participated in the burglary of a branch bank in Springdale, Ohio, on September 15, 1974.

The prosecution's repeated attempts to unfairly prejudice the jury in favor of the Government and against the Petitioner are preserved in the record.

During the testimony of the prosecution's witness, federal prisoner James Roberts who had already been convicted of the bank burglary at issue, the prosecution engaged in successive irrelevant remarks, in an attempt to prejudice the jury against bank robbers and their techniques in general so that the Petitioner specifically might be all the more condemnable. At one point, the prosecution gratuitously commented,

> Q. That's kind of an interesting pastime, looking at banks.
> Mr. Gilday: Judge, I object.
> The Court: Sustained. The jury will please disregard the comment. [T.E., Vol. I, p. 123.]

The defense objection was sustained.

At another point, the prosecution again gratuitously remarked to the witness that it's "a good idea not to spend too much time in a bank; is that right?" Immediately, the defense objected and the Court sustained the objection. [T.E., Vol. I, pp. 128-129.]

At yet another point in the testimony of this same witness, the prosecution gratuitously questioned the witness about the relative merits of leaving no fingerprints.

> Q. Now, all these tools that you have here and those tanks, et cetera and this torch head, did anybody touch these with their bare hands?
> A. Definitely not.

> Q. That's not a good idea, is it?
> Mr. Gilday: Objection.
> The Court: Sustained. [T.E., Vol. I, p. 130.]

The defense objection was sustained.

These repeated comments by the prosecution were objectionable because they were irrelevant to the inquiry at trial, whether or not the Petitioner had participated in the alleged burglary. During the prosecution's questioning of the same witness, the Court *sua sponte* cautioned the prosecution.

> The Court: Again, what is the relevancy of this? What is the relevancy to this case. There is an admission that he was there and what happened. Why all the detail?
> Mr. Winkler: I will speed it up, your Honor. [T.E., Vol. I, p. 143.]

Finally, during the testimony of the same witness Roberts, the prosecution attempted to overrun repeated defense objections and even Court rulings to improperly buttress the testimony of this prosecution witness.

> Q. Now, Mr. Roberts, have you given this testimony freely and voluntarily?
> Mr. Gilday: Judge, I object.
> The Court: Sustained, at this point.
> Q. Have I promised you anything in return for your testimony?
> Mr. Gilday: Again I object.
> The Court: Sustained. The jury will please disregard the testimony.

Q. Have you told the truth?
Mr. Gilday: Again I object.
The Court: Same ruling. [T.E., Vol. I, p. 144].

Thus, the prosecution, despite repeated Court rulings, placed before the jury the unfair impression that this prosecution witness may have been more credible than he actually was.

When the Defendant's witness William Thomas Green came to the stand, the prosecution took just the opposite tact, attempting to place before the jury the unfair impression that this defense witness may be less credible than he actually was.

Q. William Thomas Green. Now, Mr. William Thomas Green, about this particular case, have you ever told a lie to anybody about it?
Mr. Gilday: Judge, I object.
The Court: Sustained.
Q. You have been truthful today; is that right?
A. Yes, sir. To the best of my ability; yes, sir.
Q. Are you a truthful man?
Mr. Gilday: Judge, I object.
The Court: He has answered the question. [T.E., Vol. II, pp 236-237.]

It was unfair for the prosecution to badger the defense witness as to his truthfulness. Nevertheless, the prosecutor continued his attempt to discredit the witness' present testimony on the basis of other episodes completely irrelevant to the Petitioner's innocence or guilt.

Q. And isn't it true that you only admitted you were William Green after he told you that he had your fingerprints?
A. That might be right. It might be right.
Q. It might be right?
A. Yes, sir, it might be. I don't see what this has got to do with Mr. Nickells.
Q. I think the Judge can determine what has to do with Mr. Nickell.
Mr. Gilday: Judge, I object to the comment.
The Court: O.K. The jury will please disregard the comment both of the witness and of counsel. [T.E., Vol. II, p. 242.]

Undaunted, the prosecution continued, again in the face of sustained objections, to pursue matters extraneous to the question of Cecil Nickell's guilt or innocence.

Q. Well, I guess you are saying that clothes kind of make the man?
Mr. Gilday: I object.
The Court: Sustained. The jury will disregard the comment.
A. I think I said what I tried to say.
Q. Have you ever dressed nice?
Mr. Gilday: I object.
Mr. Winkler: I will withdraw it, your Honor. [T.E., Vol. II, p. 251.]

Such improper inquiries on matters not in issue were intended to discredit the defense witness in the eyes of the jury.

The prosecution took a final gratuitous potshot at the defense witness Green by a patently improper reference to looking into "bank vaults." The feeling of the Court below that such repeated remarks pos-

sessed definite potential of prejudice is apparent from the Court's order that the prosecution "desist."

> A. Mr. Prosecutor, I don't usually go look in people's trunks or people's cars, you know.
> Q. You don't?
> A. No.
> Q. You just look in bank vaults; is that right?
> Mr. Gilday: Your Honor, I object to the comment.
> The Court: Yes. The jury will please disregard these comments. Mr. Winkler, let's desist those, please.
> Mr. Winkler: Very well, your Honor. [T.E., Vol. II, p. 256.]

The Court's order to "desist those" was plain, and the prosecution's response, "Very well, your Honor," indicated the Government's understanding.

Nevertheless, the prosecution continued to make prejudicial remarks in its attempt to discredit defense witnesses.

During the cross-examination of the defense witness Roberts, the prosecution took a cheap shot directly at the witness. Again, the Court sustained the defense objection.

> Q. You don't have them [letters] here with you today, do you?
> A. No, I don't.
> Q. I didn't think so.
> Mr. Gilday: I will object.
> The Court: All right. What the United States Attorney thinks the jury will disregard.
> Mr. Gilday: Thank you. [T.E., Vol. II, p. 279.]

The prosecution's innuendos and demeaning comments against defense witnesses continued.

At one point during the cross-examination of the defense witness Sauer, the prosecution interjected,

> Q. You are not a millionaire, are you?
> Mr. Gilday: Oh, I object.
> The Court: Sustained. [T.E., Vol. II, p. 312.]

The prosecution's improper and unrelated questions continued, even during cross-examination of the Petitioner himself.

For example, the prosecution asked the length of the Petitioner's sentence on a prior conviction. Again the defense objection to the improper question was sustained.

> Q. And what was your sentence on that particular felony?
> A. Sir?
> Q. What was your sentence on that particular felony?
> A. What was the sentence?
> Mr. Haddad: Object, if your Honor please.
> The Court: Sustained. [T.E., Vol. II, p. 365.]

Throughout the trial, the prosecution attempted to support its own witnesses before the jury by remarks unrelated to the issue at bar. Throughout the trial, the prosecution attempted to discredit defense witnesses before the jury by remarks unrelated to the issue at bar. The prosecution repeatedly made improper remarks; defense objections were repeatedly sustained; and more than once the Court attempted *sua sponte* to

prevent such improper remarks. Sometimes, the prosecution even openly overrode the Court's rulings. Finally, the prosecution objected several times to legitimate closing arguments by the defense. Overall, these improprieties by supposedly experienced prosecutors may well have resulted in the jury's returning a verdict of guilty in an otherwise extremely close case.

This court has not ruled on improper prosecutorial argument since *Berger* v. *United States,* 295 U. S. 78, 84-89 (1935) where it spoke in general terms of the prosecuting attorney as a "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." The Court here continued, describing the role of the prosecutor:

> . . . he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger* v. *United States, supra,* 295 U. S. at 88.

While it cannot be denied that this is all very true, these statements render very little guidance as to where to draw the line between proper and improper

prosecutorial comment and argument. All too often a zeal for conviction has made this inquiry necessary and therefore certain boundaries need to be imposed in terms more specific than those in *Berger.* In this regard, Federal Circuit Courts of Appeal, citing *Berger,* have fashioned rules of their own, but their treatment of the matter has varied and thus leaves little certainty as to result and has little deterrent effect on prosecutors. The Eighth Circuit in *United States* v. *Splain,* 545 F. 2d 1131, 1134-1136 (8th Cir. 1976) found error (though not reversible error) in the prosecutor's improper characterizations of defendant and in his expressions of personal belief about evidence. The Court in *United States* v. *Leon,* 534 F. 2d 667, 678-683 (6th Cir. 1976) reversed a conviction due to prosecutorial misconduct involving the injection of inadmissible and irrelevant information as did the court in *United States* v. *Bell,* 506 F. 2d 207, 225-226 (D.C. Cir. 1974). Another conviction was reversed in *United States* v. *Phillips,* 527 F. 2d 1021, 1022-1025 (7th Cir. 1975) due to prosecutorial misconduct involving misstatement of the law, injection of improper information and assertion of personal belief about evidence. Finally in *Hall* v. *United States,* 419 F. 2d 582, 583-588 (5th Cir. 1969) the Court found that comments by the prosecutor involving assertions that the defendant was tampering with witnesses, expressions of personal belief about testimony, and criminal characterizations of the defendant were all highly improper.

It is hornbook law that, "evidence which is not relevant is not admissible." Federal Rule of Evidence

402. It is obviously unprofessional conduct for a prosecutor to gratuitously present before a jury impermissible comments or objectionable questions.

> It is unprofessional conduct for a prosecutor knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury. *American Bar Association Standards Relating to the Prosecution Function,* §5.6 (b) Presentation of Evidence, Approved Draft, 1971, p. 119.

In the present case, the record reveals that the prosecution repeatedly brought inadmissible matters to the attention of the jury. Thus, the facts of this case provide an excellent opportunity for this Court to reverse a conviction unjustly obtained and to offer much needed guidance with regard to proper prosecutorial comment and argument.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit failed to recognize the prejudicial error of the District Court in not following the clear statutory guidelines of 18 U.S.C. §3500. Furthermore, the denial of Petitioner's entitlement to a fair trial and to be tried solely upon competent, relevant evidence was fundamental injustice amounting to a denial of Petitioner's Fifth Amendment entitlement to due process

of law. Only this Court remains to correct that fundamental injustice. The present Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202

BERNARD J. GILDAY, JR.
1500 American Building
30 East Central Parkway
Cincinnati, Ohio 45202

Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 76-2157

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. CECIL K. NICKELL, *Defendant-Appellant.*	APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed March 28, 1977.

Before: EDWARDS, McCREE and ENGEL, Circuit Judges.

EDWARDS, Circuit Judge, delivered the opinion of the Court, in which ENGEL, Circuit Judge, joined. McCREE, Circuit Judge (pp. 12-13), filed a dissenting opinion.

EDWARDS, Circuit Judge. Appellant was convicted of aiding and abetting in unlawful entry of a bank, in violation of 18 U.S.C. §§2113(a), 2(a) (1970). After a jury trial in the United States District Court for the Southern District of Ohio, he was found guilty and sentenced to 15 years. The appellate issues principally concern claims that the prosecutor prejudiced the trial by improper questions or comments. Appellant also argues several other issues, including that a government rebuttal witness gave false testimony and that the government failed to comply with the Jencks Act.

The underlying facts of the crime were established beyond peradventure of a doubt. The factual issue for the

jury was whether or not appellant was a participant. The two would-be bank robbers, Roberts and Green, broke into the bank in question and were arrested in the bank when a silent alarm went off. According to the testimony of Roberts, one of the burglars, appellant was driving the proposed getaway car but failed to respond to their urgent CB radio request to be picked up. Appellant Nickell and the other burglar, Green, however, testified that Nickell had no part in the robbery scheme, and Nickell presented an alibi defense for the evening in question.

The government's corroboration of Robert's testimony consisted of records of phone calls between appellant's phone and that of Roberts, and other admitted associations, including appellant's presence with both bank robbers at the scene of an accident two days before the robbery. All of these associations were within days or hours of the bank robbery attempt and hence somewhat suggestive of a relationship thereto. But none of them necessarily settled the conflict between the testimony of the two actual bank burglars. Green, the other burglar, testified that he and Roberts were at Nickell's apartment on September 15, 1974 —the date of the attempted burglary—but Nickell was not present on the scene and had no part in it. He testified that the pick-up man was a black man whose name he could not remember.

Appellant presented three alibi witnesses whose testimony, if believed, would have placed appellant in his own apartment at the time of the bank burglary attempt. In various ways the government's cross-examination and rebuttal evidence tended to contradict or throw doubt on the credibility of their stories.

Appellant does not dispute that there was sufficient evidence to support the jury's finding of guilt. He does, however, assert that the claimed errors in the trial prejudiced his case and demands a new trial. Because appellant's

guilt rests primarily upon one witness who is also an accomplice, we approach his claims of prejudicial error with more than normal concern.

I. PROSECUTORIAL ABUSE

Illustrative of appellant's complaint in relation to this issue are the first five examples set out in appellant's brief:

> During the testimony of the prosecution's witness, federal prisoner James Roberts who had already been convicted of the bank burglary at issue, . . . the prosecution gratuitously commented,
>
> Q. That's kind of an interesting pasttime looking at banks.
>
> Mr. Gilday: Judge, I object.
>
> The Court: Sustained. The jury will please disregard the comment.
>
> The defense objection was sustained.

At another point, the prosecution again gratuitously remarked to the witness that it's "a good idea not to spend too much time in a bank; is that right?" Immediately, the defense objected and the Court sustained the objection.

At yet another point in the testimony of this same witness, the prosecution gratuitously questioned the witness about the relative merits of leaving no fingerprints.

> Q. Now, all these tools that you have here and those tanks, et cetera and this torch head, did anybody touch these with their bare hands?
>
> A. Definitely not.
>
> Q. That's not a good idea, is it?
>
> Mr. Gilday: Objection.
>
> The Court: Sustained.
>
> The defense objection was sustained.

These repeated comments by the prosecution were objectionable because they were irrelevant to the in-

quiry at trial, whether or not the Defendant had participated in the alleged burglary. Finally, still during the prosecution's questioning of the same witness, the Court *sua sponte* cautioned the prosecution.

The Court: Again, what is the relevancy of this? What is the relevancy to this case? There is an admission that he was there and what happened. Why all the detail?

Mr. Winkler: I will speed it up, your Honor.

Finally, during the testimony of the same witness Roberts, the prosecution attempted to overrun repeated defense objections and even Court rulings to improperly buttress the testimony of this prosecution witness.

Q. Now, Mr. Roberts, have you given this testimony freely and voluntarily?

Mr. Gilday: Judge, I object.

The Court: Sustained, at this point.

Q. Have I promised you anything in return for your testimony?

Mr. Gilday: Again I object.

The Court: Sustained. The jury will please disregard the testimony.

Q. Have you told the truth?

Mr. Gilday: Again I object.

The Court: Same ruling.

From these examples and from review of the entire transcript of this trial, we believe that appellant's complaints about prosecutorial abuse have at least some merit. The record shows that the prosecutor was rarely able to let any witness' testimony go into the record without an effort on his own part to emphasize or to discredit it. None of his comment was such as to invade the constitutional rights of the appellant, and for the most part it would have been appropriate enough had he reserved it for the prosecutorial argument. It was, however, improperly interposed

throughout the trial in a manner which cumulatively would have represented prejudicial error if it had gone unchecked or unrebuked.

Significantly, however, this record shows the contrary. The trial took place before Judge Timothy Hogan, an experienced trial judge in the Southern District of Ohio. As illustrated in the examples quoted above, at every defense objection—and sometimes without awaiting such—Judge Hogan interposed a ruling in defendant's favor and often an admonition to the jury. We can think of no better form of correction of an overzealous prosecutor than the immediate and firm response of the trial judge. However eagerly the prosecutor sought to curry favor with the jury by seeking to color the evidence with his own observations, he was calmly checked and rebuffed in every important instance by adverse rulings and admonitions from the bench. The totality of this record discloses that, whatever his intentions, the prosecutor did not succeed in achieving any unfair advantage.

We find no judicial error in the District Judge's rulings and no prosecutorial abuse which, after Judge Hogan's rulings, resulted in any unfair advantage for the government's case.

II. PERJURED TESTIMONY CLAIM

Appellant asserts entitlement to a new trial because a rebuttal witness, whose testimony contradicted a statement made by one of appellant's alibi witnesses, told a lie. Appellant claims that the lie served to cast doubt upon the alibi witness.

On cross-examination the witness, Mrs. Dils, denied that she had "lived in a residence with [her] daughter Gloria and with [the alibi witness] Bob Sauer." The question did not bear directly upon Sauer's previous alibi testimony and was not pursued. After the trial two affidavits were presented in which the declarants told of seeing Mrs. Dils in

the Sauer home. Mrs. Dils was never asked at trial whether or not she had ever been in the Sauer residence, nor was the ambiguous phrase "lived . . . with . . . Sauer" ever clarified by the cross-examiner. Accepting the affidavits at face value, they by no means support the suggestion which we believe we are meant to derive from appellant's brief, that this elderly grandmother committed perjury by denying a previously existing illicit relationship with witness Sauer.

Appellant was clearly not entitled to a new trial on this ground. *See Ashe* v. *United States,* 288 F. 2d 725, 733 (6th Cir. 1961).

III. THE JENCKS ACT ISSUE

Appellant claims prejudicial error also in the fact that the District Judge refused his motion to be allowed to inspect all of the "reports" of an FBI Agent who was a witness in the case. He asserts in effect that the Jencks Act required that on demand he be allowed to see the reports, or in the alternative that the District Judge screen the reports in camera to determine whether they should be turned over as "statements" under the Jencks Act. We do not find these requirements in the Jencks Act.

The Jencks Act defines "statement" as follows:

> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.
>
> 18 U.S.C. § 3500(e) (1970).

The "statement" referred to above is a statement of a witness whose direct testimony is presented in a criminal trial, which statment had been previously recorded and approved or adopted by the witness. Here it is undisputed that the witness statements taken by Agent Williams had been previously made available to appellant's counsel for purposes of cross-examination of other witnesses.

The question posed here, however, is not so easily answered. Agent Williams' direct testimony at trial bore only upon the fact (as claimed by him) that appellant's witness Green, on being arrested, gave a false name. Appellant does not dispute that the government furnished the "statement" which Agent Williams took from Green. The dispute before this court pertains to whether or not under subsection (b)[1] of the Jencks Act appellant must be furnished all of Agent Williams' case reports, or under subsection (c)[2] the court must require production of such re-

---

[1](b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
18 U.S.C. § 3500(b) (1970).

[2](c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement

(Footnote continued on following page)

ports for screening as to their relevance to the direct testimony of the agent. The breadth of appellant's claim is clearly set forth in the following statement to the District Judge on the part of one of appellant's counsel, Mr. Haddad: "Well, I don't know. We think that anything that this witness may have submitted, committed to writing would be discoverable once he is called to the stand."

We do not find such broad requirements in the Jencks Act or in any of the cases cited to us by appellant. The purpose of the Jencks Act itself was to restrict a defendant's right to any general exploration of the government's files[3]—a right Congress feared it perceived in *Jencks* v. *United States,* 353 U. S. 657 (1957). *See Goldberg* v. *United States,* 425 U. S. 94, 104 (1976); *Palermo* v. *United States,* 360 U. S. 343, 345-50 (1959).

Finding the Jencks Act to be inapplicable here is not the end of the inquiry, however. We recognize that the Supreme Court has repeatedly upheld the trial court's "inher-

---

(Footnote continued from preceding page)
to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.
18 U.S.C. § 3500(c) (1970).

[3](a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
18 U.S.C. § 3500(a) (1970).

ent power" to require production of all relevant facts in a criminal trial. In *United States* v. *Nobles* the Court said:

> Decisions of this Court repeatedly have recognized the federal judiciary's inherent power to require the prosecution to produce the previously recorded statements of its witnesses so that the defense may get the full benefit of cross-examination and the truth-finding process may be enhanced. See, *e. g., Jencks* v. *United States,* 353 U. S. 657 (1957); *Gordon* v. *United States,* 344 U. S. 414 (1953); *Goldman* v. *United States,* 316 U. S. 129 (1942); *Palermo* v. *United States,* 360 U. S. 343, 361 (1959) (BRENNAN, J., concurring in result).
> *United States* v. *Nobles,* 422 U. S. 225, 231 (1975). (Footnote omitted.)

In these cases, and all of the cases relied upon by appellant, there has, however, been some foundation[4] laid for production of the material sought which indicated the existence of a prior "statement" relevant to the issues at trial as to which the witness had testified. *See Goldberg* v. *United States, supra; United States* v. *Chitwood,* 457 F. 2d 676, 678 (6th Cir.), *cert. denied,* 409 U. S. 858 (1972); *United States* v. *Conder,* 423 F. 2d 904, 911 (6th Cir.), *cert. denied,* 400 U. S. 958 (1970).

Frequently the dispute needing resolution was whether or not the witness had adopted or approved the statement within the meaning of the Jencks Act. *See Goldberg* v. *United States, supra* at 110; *Campbell* v. *United States,* 373 U. S. 487, 492-93 (1963); *United States* v. *Chitwood, supra* at 678.

---

[4]We employ the word "foundation" in the sense it was used by the Court in *Jencks* v. *United States,* 353 U. S. 657, 666 (1957):

> Both the trial court and the Court of Appeals erred. We hold that the petitioner was not required to lay a preliminary foundation of inconsistency, because a sufficient foundation was established by the testimony of Matusow and Ford that their reports were of the events and activities related in their testimony.

Here, as previously noted, Agent Williams' recordation of witness Green's statement was furnished under the Jencks Act. This represents compliance with the thrust of the Jencks Act and most of the cases cited to us. But because Agent Williams became a witness as to what Green said, appellant now seeks discovery "of anything that this witness may have . . . committed to writing. . . ." Our endorsement of this broad right would require either a wholesale turnover of FBI files to any defendant on demand, or at a minimum, that the trial judge examine for relevance and materiality all of the reports filed by any government agent who took the witness stand. The first of these alternatives would have the potentiality for placing in the hands of a person (or persons) charged with crime much confidential government information which had no bearing at all upon the issue of guilt or innocence at the trial involved. Routine judicial screening, however, would pose no such problem and might on occasion contribute to a more just result. But it surely would represent an additional substantial burden to our overburdened federal trial judges and further delay the trial of criminal cases. In the face of clear Congressional opposition to such "rummaging" of the FBI files as was expressed in the Jencks Act, and in the absence of any clear affirmative mandate from the Supreme Court, we decline appellant's invitation to adopt such a broad (and necessarily unilateral) discovery rule.

In this case an experienced District Judge found no reason to require production of the FBI reports for either turnover or screening.

The record before him disclosed no basis for belief that a Jencks Act "statement" existed other than those already furnished to defense counsel. Additionally, the District Judge had before him no showing of relevance or materiality of any evidence contained in Agent Williams' "reports." These facts represent decisive distinction between this case

and those relied upon by Judge McCree's dissent. The question of routine trial producibility of FBI files and reports other than witness statements "written . . ., signed, or otherwise adopted or approved by him" was decided in the negative in *Palermo* v. *United States,* 360 U. S. 343, 349-51 (1959). *Palermo* has been frequently discussed and cited by the Supreme Court, but never overruled. *See Campbell* v. *United States,* 365 U. S. 85 (1961) [*Campbell* I]; *Campbell* v. *United States,* 373 U. S. 487 (1963) [*Campbell* II]; *Goldberg* v. *United States,* 425 U. S. 94 (1976).

We therefore held that where the District Judge has discovered no foundation for either turnover or judicial screening of FBI files, and the appellate record discloses none except the unsupported demand of the defendant, the District Judge's refusal to order either turnover or screening is not an abuse of judicial discretion.

The remaining three of appellant's stated issues do not require discussion. We have examined them against the record of this case and find them without merit.

The judgment of the District Court is affirmed.

McCree, Circuit Judge (Dissenting). I respectully dissent. I disagree with that part of the majority opinion that suggests that statement of law enforcement agents who testify at trial are not subject to the provisions of the Jencks Act. The Act permits a defendant to inspect the authenticated or adopted statement of any government witness who has testified. A witness' statement is ordinarily an account of relevant information known to the witness and communicated to government agents during the course of their investigation. However, law enforcement agents themselves also often acquire information about offenses and they are often called to testify about their knowledge. Their information is not always recorded in the same form as is that furnished by other witnesses. The agents instead may include their information in investigative reports that

also include much evaluation and discussion of prosecution strategy. Nevertheless, a defendant is entitled under the Jencks Act to any part of an investigative report that is a statement of an agent's knowledge of facts, which if recounted by any other witness and recorded by the agent would be available to the defendant under the Jencks Act.

Such statements, like the statements of other witnesses, should be ordered produced if they relate to the subject matter of the agent's testimony. *See United States* v. *Johnson,* 521 F. 2d 1318 (9th Cir. 1975); *Lewis* v. *United States,* 340 F. 2d 678, 682 (8th Cir. 1965); *United States* v. *Bell,* 457 F. 2d 1231, 1235 (5th Cir. 1972).

If the government claims that any document ordered produced for inspection contains more than the statement of a witness or does not relate to the subject matter of his testimony, the district court must examine the material and excise those portions that are not available to the defendant under the Act. The Act requires this procedure even if the defendant's request for inspection includes writings some of which are obviously not related to the testimony given by the witness or include evaluative or tactical notations. See, *e.g., United States* v. *Mason,* 523 F. 2d 1122 (D.C. Cir. 1975). And the court may not delegate to the government its duty to determine whether or not the requested material is available for inspection by the defendant.

I share the concern of the majority opinion for the workload of overburdened district judges, but I would not permit this consideration to cause us to overlook the clear mandate of the statute. I would remand to permit the district court to make the required inspection and determination. See *Goldberg* v. *United States,* 425 U. S. 94, 111 (1976).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 76-2157

UNITED STATES OF AMERICA - - - *Plaintiff-Appellee*

v.

CECIL K. NICKELL - - - - - *Defendant-Appellant*

ORDER—Filed February 3, 1978

Before: PHILLIPS, Chief Judge, EDWARDS and ENGEL, Circuit Judges.

On receipt and consideration of appellant's petition for rehearing; and

The panel having ordered a response by respondent United States, and having given careful consideration to said petition and the response thereto and finding no merit to said petition,

Now, therefore, the petition for rehearing is hereby denied.

Entered by order of the Court
(s) John P. Hehman
Clerk